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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                   UNITED STATES OF AMERICA,

CASE NO. C12-1282JLR

11                   Plaintiff,

ORDER REGARDING THE  
CITY'S NOTICE OF THE  
COUNCIL'S ORDINANCE  
REGARDING CROWD  
CONTROL WEAPONS

12                   v.

13                   CITY OF SEATTLE,

14                   Defendant.

15                   Before the court is Defendant City of Seattle's ("the City") "Notice of Ordinance  
16 Regarding Crowd Control Weapons." (See Notice (Dkt. # 625).) The City denominates  
17 its filing as a "notice" but—in substance—it is more than a notice; it is a motion. Indeed,  
18 contained within the City's notice is the Seattle Police Department's ("SPD") request to  
19 "enjoin" the July 26, 2020, effective date of the Seattle City Council's ("the Council")  
20 Ordinance No. 126102, which places restrictions on SPD's use of certain crowd control  
21 weapons ("CCW Ordinance"). (Notice at 6.) The City's notice states that City of Seattle  
22 Mayor Jenny Durkin joins SPD's request. (*Id.*)

1       The Council's CCW Ordinance prohibits the City's use or possession of "crowd  
2 control weapons," which are defined to include "kinetic impact projectiles, chemical  
3 irritants, acoustic weapons, direct energy weapons, water cannons, disorientation devices,  
4 ultrasonic cannons, or any other device that is designed to be used on multiple individuals  
5 for crowd control and is designed to cause pain or discomfort." (*See* Notice at 2; *see also*  
6 *id.*, Ex. 1 (attaching a copy of the CCW Ordinance) §§ 1(A), 1(B).) The CCW Ordinance  
7 makes an exception for the use of oleoresin capsicum spray ("OC spray") outside the  
8 setting of a "demonstration, rally, or other First Amendment-protect event." (*Id.* Ex. 1  
9 § 1(D)(2).) However, when used, OC spray must not "land on anyone other than" "an  
10 individual in the process of committing a criminal act or presenting an imminent danger  
11 to others." (*Id.*) Finally, the CCW ordinance also creates a private right of action for  
12 individuals against whom a prohibited crowd control weapon is used. (*Id.*, Ex 1  
13 §§ 1(E)-(F).) Because Mayor Durkan returned the CCW Ordinance to the City Council  
14 without a signature, the Ordinance will take effect on July 26, 2020. (*See* Notice at 3; *see*  
15 *also id.*, Ex. 1 § 5 ("This ordinance shall take effect and be in force 30 days after it is  
16 approved by the Mayor, but if not approved and returned by the Mayor within ten days of  
17 presentation, it shall take effect as provided by Seattle Municipal Code Section  
18 1.04.020.").)

19       SPD's and the Mayor's request to enjoin the July 26, 2020, effective date of the  
20 CCW Ordinance is the equivalent of a motion for either a preliminary injunction or a  
21 temporary restraining order ("TRO"). (*See* Notice at 6 ("SPD respectfully request that  
22 the effective date of the CCW Ordinance be enjoined until a thorough review is

1 conducted by . . . the [c]ourt . . . , and Mayor Durkin joins that request.”).) Therefore, the  
2 court construes the City’s notice as a motion for a preliminary injunction or a TRO and  
3 analyzes it as such.

4 The standard the court must consider before imposing either a preliminary  
5 injunction or a TRO is the same. *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL  
6 1304557, at \*1 (W.D. Wash. Mar. 19, 2020) (citing *New Motor Vehicle Bd. of Cal. v.*  
7 *Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977)). These remedies are  
8 “extraordinary” and “may only be awarded upon a clear showing that the plaintiff is  
9 entitled to such relief.” See *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 375  
10 (9th Cir. 2016) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)). To  
11 obtain such relief, “[a] plaintiff . . . must establish that he is likely to succeed on the  
12 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that  
13 the balance of equities tips in his favor, and that an injunction is in the public interest.”  
14 *Winter*, 555 U.S. at 20. “A plaintiff must make a showing as to each of these elements,  
15 although in [the Ninth Circuit] ‘if a plaintiff can only show that there are ‘serious  
16 questions going to the merits’—a lesser showing than likelihood of success on the  
17 merits—then a preliminary injunction may still issue if the ‘balance of hardships tips  
18 sharply in the plaintiff’s favor,’ and the other two *Winter* factors are satisfied.” *Feldman*,  
19 843 F.3d at 375 (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1282, 1291  
20 (9th Cir. 2013)). “That is, ‘serious questions going to the merits’ and a balance of  
21 hardships that tips sharply towards the plaintiff can support issuance of a preliminary  
22 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable

1      injury and that the injunction is in the public interest.” *All. for the Wild Rockies v.*  
 2      *Cotrell*, 632 F.3d 1127, 1135 (9th Cir. 2001).

3           Neither SPD nor the Mayor have made the required showing for the court to  
 4      impose such extraordinary relief. Although in her June 29, 2020, letter sending the new  
 5      ordinance back to the City Council unsigned, Mayor Durkan expressed concern that the  
 6      CCW Ordinance may conflict with court orders under the Consent Decree<sup>1</sup> (*see* Notice at  
 7      3; *see also id.*, Ex. 3 (attaching the 6/29/20 Durkan letter)), such concerns are a far cry  
 8      from establishing “a likelihood of success on the merits” or even “serious questions going  
 9      to the merits” of the claim. *Feldman*, 843 F.3d at 375. Indeed, the City’s notice makes  
 10     no attempt to even identify the specific provisions of the Consent Decree that the CCW  
 11     Ordinance may implicate. (*See generally* Notice.) Nevertheless, the City argues that the  
 12     new ordinance will require changes to SPD policies that the court previously approved  
 13     and that the Monitor and Plaintiff United States of America (“the Government”) have  
 14     taken the position that the Consent Decree prohibits SPD from implementing changes to  
 15     the policies the Consent Decree governs until after the court has had an opportunity to  
 16     review and approve those changes. (*See id.* at 3-4.) Yet, the City admits that the Consent  
 17     Decree is silent about what should happen when the City Council passes legislation  
 18     requiring SPD to change its practices to address complaints about alleged police  
 19     misconduct, as is the case with the CCW Ordinance. (*See id.* at 4-5.)

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21     <sup>1</sup> (Consent Decree (Dkt. # 3-1) (attaching Settlement Agreement); (Dkt. # 8) (order  
 22     provisionally approving the Settlement Agreement); (Dkt. # 13) (order modifying and  
       preliminarily approving the Settlement Agreement).)

1       The court also notes that other restrictions on SPD's use of crowd control weapons  
2 have been recently imposed without eliciting the same reaction from the City or the  
3 Government concerning any conflict with the Consent Decree. For example, on June 12,  
4 2020, the Honorable Richard A. Jones issued a TRO limiting SPD's use of chemical  
5 irritants and projectiles against individuals engaged in peaceful protests or  
6 demonstrations in Seattle. (*See Black Lives Matter Seattle-King County, et al., v. City of*  
7 *Seattle*, No. C20-0887RAJ (W.D. Wash.), Dkt. # 34.) Moreover, on June 17, 2020, the  
8 City stipulated to the entry of preliminary injunction also limiting SPD's use of chemical  
9 irritants and projectiles in the same matter. (*Id.*, Dkt. # 41.) Judge Jones granted the  
10 parties' stipulation and entered a preliminary injunction on the same day. (*Id.*, Dkt. # 42  
11 ("Judge Jones PI").) Judge Jones's preliminary injunction does not expire until  
12 September 30, 2020.<sup>2</sup> (*Id.* at 3.) Further, on June 5, 2020, Seattle Police Chief Carmen

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14       <sup>2</sup> Judge Jones's preliminary injunction states in pertinent part:

15       The City . . . , including [SPD] and any other officers, departments, agencies, or  
16 organizations under [SPD's] control . . . , is hereby enjoined from employing  
17 chemical irritants or projectiles of any kind against persons peacefully engaging in  
18 protests or demonstrations. This injunction includes: (1) any chemical irritant such  
19 as and including CS Gas ("tear gas") and OC spray ("pepper spray") and (2) any  
20 projectile such as and including flash-bang grenades, "pepper balls," "blast balls,"  
21 rubber bullets, and foam-tip projectiles. This Order does not preclude individual  
22 officers from taking necessary, reasonable, proportional, and targeted action to  
protect against a specific imminent threat of physical harm to themselves or  
identifiable others or to respond to specific acts of violence or destruction of  
property. Further, tear gas may be used only if (a) efforts to subdue a threat by  
using alternative crowd measures, including pepper spray, as permitted by this  
paragraph, have been exhausted and ineffective and (b) SPD's Chief of Police has  
determined that use of tear gas is the only reasonable alternative available. The  
Chief of Police may only authorize limited and targeted use of tear gas and must  
direct it to those causing violent or potentially life-threatening activity. To the  
extent that chemical irritants or projectiles are used in accordance with this

1 Best issued her own suspension of SPD's use of CS gas for at least 30 days. (Notice Ex.  
 2 6 (Dkt. # 625-3) at 2 ("As you know, earlier today Chief Best announced that [SPD] is  
 3 suspending the use of CS gas for at least thirty (30) days or longer . . .").) Although the  
 4 City Council's new ordinance may go further than either Judge Jones's order or Chief  
 5 Best's suspension, neither of these other actions provoked the City or the Government to  
 6 notify the court of any potential inconsistency with the Consent Decree or the need to  
 7 impose injunctive relief. Accordingly, the court concludes that neither SPD nor the  
 8 Mayor have established either a likelihood of success on the merits or even serious  
 9 questions going to the merits of the claim.

10 In addition to failing to establish a likelihood of success on the merits or at least  
 11 serious questions going to the merits, the City's notice also fails to address any of the  
 12 other required elements for a TRO or preliminary injunction, including a likelihood of  
 13 irreparable injury, that the balance of the equities favors the entry of a TRO or  
 14 preliminary injunction, and that such extraordinary relief would be in the public interest.  
 15 *Winter*, 555 U.S. at 20. Having failed to establish any of the requisites necessary to  
 16 impose either a TRO or preliminary injunction against the effective date of the new  
 17 ordinance, the court DENIES SPD's and the Mayor's request for one without prejudice if  
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 20 paragraph, they shall not be deployed indiscriminately into a crowd and to the  
 21 extent reasonably possible, they should be targeted at the specific imminent threat  
 22 of physical harm to themselves or identifiable others or to respond to specific acts  
 of violence or destruction of property.

(Judge Jones PI at 2.)

1   circumstances warrant a renewed motion and the City has a good faith belief that it can  
2   meet the necessary standards for obtaining a TRO or preliminary injunction.

3                 In any event, the court recognizes that it will eventually need to assess what effect  
4   the CCW Ordinance may have on SPD's current policies in areas governed by the  
5   Consent Decree and whether the CCW Ordinance conflicts in any way with the Consent  
6   Decree. The City Council recognized the court's authority in this regard when it  
7   expressly asked the City Attorney to notify the court about the CCW Ordinance. (*See*  
8   Notice, Ex. 1 (attaching a copy of the CCW Ordinance) at 5 ("In accordance with United  
9   States of America v. City of Seattle, . . . during the pendency of the [C]onsent [D]ecree  
10   [the City] Council requests that notice of this action be submitted by the City Attorney to  
11   . . . the [c]ourt . . .").)

12                 Toward that end, the court will be guided by the recommendations of the Seattle  
13   Office of Police Accountability ("the OPA") and the Seattle Office of Inspector General  
14   ("the IG"). (*See* Notice, Ex. 5 (Dkt. # 625-3) (attaching a joint statement from the OPA  
15   and the IG).) The IG is an office created through work performed under the Consent  
16   Decree, and similar work under the Consent Decree has modernized the OPA. These  
17   entities are now fully operational and engaged in the oversight work they were designed  
18   to perform. The OPA and the IG inform the court that they are

19                 . . . working in collaboration with the Community Police Commission  
20   [("CPC")] to identify evidence-based recommendations concerning  
21   modifications to SPD policies that are consistent with national best practices,  
22   consider the specific needs and concerns of Seattle, and recognize the  
                  potential appropriate roles less-lethal tools may play during demonstrations  
                  and during patrol operations to reduce the need to use potentially more  
                  harmful force options."

(*Id.* at 1.) The OPA and the IG state that they also anticipate that the CPC will conduct outreach to assess the wider community perspective. (*Id.* at 2.) Thus, these entities “are engaged in a comprehensive look at SPD’s current policies, industry best standards, and Seattle community expectations regarding the use of less lethal weapons.” (*Id.*) The City Council has asked for their input by August 15, 2020, and the OPA and the IG have committed to do so. (*See id.*) Finally, the OPA and the IG request that the court “reserve any ruling on the specific language or provisions of SPD policy regarding the use of less lethal weapons until the City submits a copy of [their] recommendations to the [c]ourt for its consideration.” (*Id.*)

The OPA and the IG propose a sound of course of action, which the court adopts. Absent unexpected developments, the court will refrain from any substantive rulings concerning the new ordinance, its effect on current SPD policies, or its possible interaction with the Consent Decree until the OPA and the IG have completed their analysis and submitted their report. Accordingly, the court ORDERS the City to submit a copy of the OPA and IG’s anticipated report to the court as soon as practicable after the City receives it but, in any case, no later than August 15, 2020. In addition, the court ORDERS the parties to submit memoranda by August 22, 2020, analyzing the interaction of the CCW Ordinance with the Consent Decree, as well as with any SPD policies that the Consent Decree governs. The court also directs the parties to respond to the OPA and IG’s anticipated report in their memoranda. Finally, the CPC may, but is not required to, submit its own analysis of the CCW Ordinance, its interaction with the Consent Decree

1 and SPD policies governed by the Consent Decree, and the OPA and IG's report by  
2 August 22, 2020.

3 Dated this 22nd day of July, 2020.

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7 JAMES L. ROBART  
8 United States District Judge  
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